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## EXECUTIVE SUMMARY

While the Commission is to be applauded for its efforts to promote the development of wireless cable in the *MDS Auction Order*, further fine-tuning is necessary.

The Commission should reconsider its decision to afford BTA authorization holders a right of first refusal with respect to new leases of ITFS excess capacity. The right of first refusal has been adopted in violation of Section 553(b) of the Administrative Procedures Act, and is inconsistent with the Commission's stated objective of promoting channel accumulation by wireless cable system operators.

The Commission also should clarify the rights that will be afforded BTA authorization holders following the five-year build-out period. The Commission should set a ten year term for BTA authorizations, with a renewal expectancy similar to that awarded in other auction services. After the five year build-out period, the holder of the BTA authorization or the remaining partitioned service area should be entitled to add new stations within its service area. The Commission should also establish a uniform expiration date for all MDS and CITFS station licenses issued to BTA authorization holders

There is a need to conform the PSAs afforded the various MDS and ITFS stations providing channel capacity to a wireless cable system operator. The Commission should afford an ITFS licensee collocating with an MDS station that is relocated after September 15, 1995 the flexibility to select the same coordinates as the MDS station for the center reference point of its ITFS PSA. The Commission should also reconsider its decision to reduce the PSA afforded ITFS stations leased to a BTA authorization holder from 35 miles to the BTA boundary under some circumstances. In this manner, the Commission can achieve the recognized benefits that accrue when a wireless cable operator has identical PSAs for all channels.

The various interference protection obligations of BTA authorization holders, incumbent MDS stations and ITFS stations need to be clarified. The BTA authorization holder must be required to cure interference caused to ITFS facilities. The Commission should clarify the policies that will govern the interference protection obligations of ITFS stations to BTA authorization holders. Ambiguities as to which incumbent MDS facilities will be permitted to exceed the power flux density limit at the PSA boundary should be resolved. The Commission also should amend newly-adopted Section 21.938(e) to conform to its policies regarding the interference protection obligations of incumbent MDS stations. In addition, the Commission should clarify that MDS and ITFS stations must be protected from actual harmful interference at all points within the PSA, and restore former Section 21.904(c)(2) of the Rules, which was inadvertently omitted when the Rules were revised.

The Commission also should confirm that an incumbent wireless cable system operator

that currently both operates a wireless cable system and holds a cable franchise within a BTA remains eligible to bid for that BTA authorization.

Finally, miscellaneous ambiguities in the *MDS Auction Order* need to be clarified. The Commission should clarify that the coordinates for the center of incumbent MDS PSAs will be determined as of September 15, 1995. It also should clarify that every MDS station authorized or proposed prior to September 15, 1995 will be treated as an "incumbent."

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 21 and 74 of the Commission's	)	MM Docket No. 94-131
Rules With Regard to Filing Procedures in the	)	
Multipoint Distribution Service and in the Instructional	)	
Television Fixed Service	)	
	)	
and	)	
	)	
Implementation of Section 309(j) of the	)	PP Docket No. 93-523
Communications Act - Competitive Bidding	)	

**PETITION FOR RECONSIDERATION AND CLARIFICATION**

The Wireless Cable Association International, Inc. ("WCAI"),<sup>1/</sup> by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petitions the Commission to reconsider and clarify certain of the rules and policies adopted in the *Report and Order* in these proceedings ("*MDS Auction Order*").<sup>2/</sup>

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<sup>1/</sup>WCAI is the trade association of the wireless cable industry. Its members include licensees in the Multipoint Distribution Service ("MDS") and the Instructional Television Fixed Service ("ITFS"), the operators of virtually every wireless cable system in the United States, program vendors and equipment manufacturers. Its Board of Directors consists of, among others, representatives of numerous educational organizations. WCAI was an active participant throughout this proceeding, submitting formal comments and reply comments in response to the *Notice of Proposed Rule Making. Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 7665 (1994)[hereinafter cited as "*NPRM*"]. Thus, WCAI's standing to petition for reconsideration and clarification of the *Report and Order* in this docket is patent.

<sup>2/</sup>*Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed*  
(continued...)

## I. INTRODUCTION.

The Commission is to be applauded for its effort to eliminate the disastrous system of awarding MDS licenses by random selection in a manner that will "allow operators to enhance their service more rapidly, providing more competition to wired cable."<sup>2/</sup> During the proceedings leading up to the *MDS Auction Order*, operators of existing wireless cable system were understandably concerned that the Commission might undermine today's wireless cable industry in order to maximize auction revenue from those hoping to use MDS channels in the future. Thus, WCAI is pleased that the *MDS Auction Order*, coupled with the companion *Second Order on Reconsideration* in Gen. Docket No. 90-54 ("*Gen. Docket No. 90-54 Second Reconsideration Order*"),<sup>4/</sup> are generally fair to incumbent licensees and wireless cable system operators. However, given the massive changes in the MDS regulatory environment promulgated by the *MDS Auction Order*, it is not surprising that further fine tuning is necessary in order to provide rules that are clear and unambiguous and which are fair to incumbents and newcomers alike.

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<sup>2/</sup>(...continued)

*Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, FCC 95-230 (rel. June 30, 1995)[hereinafter cited as "*MDS Auction Order*"].

<sup>3/</sup>*NPRM* at ¶ 1.

<sup>4/</sup>*See Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, Gen. Docket Nos. 90-54 and 80-113, FCC 95-231 (rel. June 21, 1995)[hereinafter cited as "*Gen. Docket No. 90-54 Second Reconsideration Order*"].

## II. DISCUSSION.

### *A. The Commission Should Reconsider Its Decision To Afford BTA Authorization Holders A Right Of First Refusal With Respect To New Leases Of ITFS Excess Capacity.*

Of all of the decisions contained within the *MDS Auction Order*, perhaps none is as threatening to the objective of preserving today's wireless cable industry as the Commission's statement that, while "ITFS station licensees and prospective ITFS applicants that seek to construct and operate new ITFS facilities located within a BTA and that choose to lease excess channel capacity will be free to negotiate with any potential lessee, including the holder of the BTA, . . . the holder of the BTA will be afforded the right to match the final offer of any proposed lessee."<sup>2/</sup> This right of first refusal, which was never proposed in the *NPRM*, has been adopted without the notice and opportunity to comment guaranteed by Section 553(b) of the Administrative Procedures Act ("APA"). More importantly, this failure to comply with the APA is not merely a procedural error, for the resulting policy cannot be squared with the Commission's fundamental policy objectives.

#### **1. The Right Of First Refusal Has Been Adopted In Violation Of Section 553(b) Of The Administrative Procedures Act.**

Section 553(b)(3) of the APA mandates that before the Commission adopts a new rule,

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<sup>2/</sup>*MDS Auction Order*, at ¶ 41. The Commission has afforded Basic Trading Area ("BTA") authorization holders the right to partition their areas and, in cases where the BTA authorization holder fails to meet the five-year build-out requirement, the Commission has reserved the right to force a partition. The authorization holder for a partitioned service area generally has the rights and responsibilities of a BTA authorization holder. *See id.* at ¶¶ 43, 46. For the sake of simplicity, in this petition WCAI will generally refer to BTAs to refer to both BTAs and partitioned service areas, and will refer to BTA authorization holders to refer to the holder of a master authorization for either a BTA or a partitioned service area, unless the context dictates otherwise.



it must publish in the *Federal Register* a notice of the proposal that includes “either the terms or substance of the proposed rule or description of the subjects and issues involved.”<sup>6/</sup> While the courts have found adequate notice when “the final rule is a ‘logical outgrowth’ of the one proposed,”<sup>7/</sup> the notice must nonetheless “provide sufficient detail and rationale for the rule to permit interested parties to participate meaningfully.”<sup>8/</sup> As a matter of law, the right of first refusal cannot stand unless one can reasonably conclude “that given a new opportunity to comment, commenters would not have their first occasion to offer new and different criticisms which the [Commission] might find convincing.”<sup>9/</sup>

In this case, the requisite conclusion cannot be reached. The *NPRM* is devoid of any specific proposal to afford BTA authorization holders a right of first refusal. Nothing in the *NPRM* even suggests that the Commission was contemplating altering the long-standing right of ITFS licensees to select their own lessees. To the contrary, both the text of the *NPRM* and the summary of the *NPRM* published in the *Federal Register* specifically stated that “[t]he only aspect of this proceeding which we propose to apply to ITFS is the electronic filing

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<sup>6/</sup>5 USC § 553(b)(3) (1982).

<sup>7/</sup>*Shell Oil Co. v. EPA*, 950 F.2d 741, 747 (D.C. Cir. 1991).

<sup>8/</sup>*Horsehead Resource Development v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) citing *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991).

<sup>9/</sup>*Natural Resources Defense Counsel v. E.P.A.*, 824 F.2d 1258, 1284 (1st Cir. 1987) citing *BASF Wyandotte Corp. v. Costel*, 598 F.2d 637, 642 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096 (1980).

proposal.”<sup>10/</sup> It cannot be gainsaid that the right of first refusal is a logical outgrowth of the *NPRM* when this unambiguous statement led WCAI and other interested parties to reasonably conclude that the Commission had no intention of addressing any aspect of the rules and policies governing ITFS other than those governing the process for filing applications. The fact that not one of the parties commenting in this proceeding addressed whether BTA authorization holders should have any preferential access to ITFS excess capacity speaks volumes as to the inadequacy of the Commission’s *NPRM*.

The notice requirement of Section 553(b)(3) advances three important objectives:

First, notice improves the quality of agency rulemaking by ensuring that agency regulations will be “tested by exposure to diverse public comment.” Second, notice and the opportunity to be heard are an essential component of “fairness to affected parties.” Third, by giving affected parties an opportunity to develop evidence in the record to support their objections to a rule, notice enhances the quality of judicial review.<sup>11/</sup>

Not one of these objectives has been served in this situation.

Therefore, if -- notwithstanding the arguments advanced below -- the Commission continues to believe that a right of first refusal would serve the public interest, the Commission must issue a *Further Notice of Proposed Rulemaking* to solicit comments on whether any right of first refusal should be given to the BTA authorization holder.<sup>12/</sup> In this

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<sup>10/</sup>*NPRM* at 7666 n. 2; 59 Fed. Reg. 63,743 n. 2 (Dec. 9, 1994)(emphasis added).

<sup>11/</sup>*Small Refiner Lead Phase Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983)(citations omitted).

<sup>12/</sup> Issuance of a *Further Notice of Proposed Rulemaking* will also permit the Commission to suggest, and interested parties an opportunity to comment on, proposed rules that will close  
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way, and only in this way, can the Commission's obligation under Section 553(b)(3) be fulfilled.<sup>13/</sup>

## **2. Awarding BTA Authorization Holders A Right Of First Refusal Is Inconsistent With The Commission's Stated Policy Objectives.**

Had the Commission given adequate notice of its desire to award the BTA authorization holder with a right of first refusal with respect to leases of excess capacity on ITFS stations within its BTA, WCAI would have vigorously objected in responding to the *NPRM*. Simply put, the decision to afford each BTA authorization holder a right of first

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<sup>12/</sup>(...continued)

the gaping holes that exist in the Commission's current right of first refusal policy. Since the Commission has failed to promulgate any specific rules governing the right of first refusal, and the *MDS Auction Order* devotes only a few scant sentences to the policy, there are a myriad of unanswered questions. For example, can the BTA authorization holder invoke its right of first refusal only during the five year build-out period, or does the right continue for some longer period? What are the mechanics of the right of first refusal? When and how must the ITFS licensee notify the BTA authorization holder of its intent to lease excess capacity to another party? Must the BTA authorization holder be provided with a complete copy of the lease, or merely a summary of the critical terms of the lease? How long will the BTA authorization holder have to decide whether it will exercise its right or not? These are all essential questions that must be answered before any right of first refusal can be implemented.

In addition, a *Further Notice of Proposed Rulemaking* will provide the Commission a vehicle for clarifying when the right of first refusal attaches. The *MDS Auction Order* provides that the right of first refusal "is not intended to interfere with present contractual rights that are in effect or renewal of those rights." *MDS Auction Order* at ¶ 41. The Commission's staff has informally stated that this language means that the right of first refusal does not apply to any agreement entered into prior to the date on which the BTA authorization for the particular market is granted. To avoid any disputes in the future, this interpretation should be confirmed.

<sup>13/</sup>See *National Tour Brokers Ass'n v. U.S.*, 591 F.2d 896, 901-902 (D.C. Cir. 1978)(opportunity to seek reconsideration does not satisfy notice and opportunity requirement of Section 553(b)(3)).

refusal with respect to leases of excess capacity on ITFS stations within its BTA cannot be squared with the Commission's stated "goal of establishing. . . policies that encourage the accumulation of a full complement of channels necessary for a viable MDS system."<sup>14/</sup>

The Commission has consistently recognized that "wireless cable operators must have access to as many available channels as possible in order to meet subscriber demand and compete with wired cable television systems in the same area."<sup>15/</sup> Perversely, the right of first refusal is a mechanism that can actually be used to deprive wireless cable system operators of essential channel capacity needed to compete with cable and Direct Broadcast Satellite ("DBS") systems which enjoy greater channel capacity. For example, it is not unusual for an operating wireless cable system to be utilizing most of the available channels in a given market, but to lack access to a few ITFS channels. In such a case, even if the wireless cable system operator subsequently enters into a lease of excess capacity on those remaining ITFS channels, an exercise of the right of first refusal could prevent accumulation of a full channel complement by that operator.<sup>16/</sup> Rather than promote channel accumulation, the right of first

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<sup>14/</sup>*MDS Auction Order* at ¶ 41.

<sup>15/</sup>*Id.* at ¶ 10. See also *Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service*, 9 FCC Rcd 3360, 3364 (1994) ("wireless cable operators endeavoring to compete with wired cable systems, whose number of channels often exceeds 50, must have access to as many of the available 32 or 33 ITFS and MMDS channels as possible in a given market.")

<sup>16/</sup>The *MDS Auction Order* provides that the right of first refusal "is not intended to interfere with present contractual rights that are in effect or renewal of those rights." *MDS Auction Order* at ¶ 41. The Commission's staff has informally stated that this language means that the right of first refusal does not apply to any agreement entered into prior to the  
(continued...)

refusal could lead to channel disaggregation -- a result that is inconsistent with the stated objective of the right of first refusal policy.

The right of first refusal is not only fundamentally unfair to wireless cable system operators who have invested time, energy and money to accumulate the critical mass of channels necessary to compete, it is also an unwarranted intrusion into the affairs of ITFS licensees. When the Commission first authorized the leasing of ITFS excess capacity, it recognized that "ITFS will not engage in a generalized holding out of their excess capacity, but instead will carefully select lessees for long-term contracts."<sup>17/</sup> The Commission has proven prescient. Many educators, particularly those that have experience in ITFS, are painstaking in their selection of wireless cable lessors.

The care with which educators evaluate prospective lessors is not surprising, for each

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<sup>16/</sup>(...continued)

date on which the BTA authorization for the particular market is granted. *See supra* note 12. While this affords a window of opportunity for those currently developing wireless cable systems to secure access to ITFS excess capacity, it does not fully eliminate the problem. Wireless cable system developers have found that many educational institutions are burdened with cumbersome bureaucracies and administrative requirements, and that they are often incapable of making decisions regarding excess capacity leases rapidly. Compounding the problem, the *MDS Auction Order* was released during the summer, when many education institutions are on limited schedules and incapable of addressing excess capacity lease proposals. Thus, while it appears that BTA authorizations will not be issued until November at the earliest, that is not necessarily sufficient time to assure that those currently operating or developing wireless cable systems will be able to complete their accumulation of ITFS excess capacity.

<sup>17/</sup>*Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 94 F.C.C.2d, 1203, 1252 (1983)(emphasis added).

educator has a great stake in assuring that the wireless cable operator to whom it leases will succeed. It is commonplace within the industry for excess capacity lessors to be compensated based upon the number of subscribers to the wireless cable system. Thus, it is in the best interest of any ITFS licensee to lease to the party that will attract the largest subscriber base. Particularly because the spectrum is so heavily encumbered with incumbent MDS and ITFS stations, it does not necessarily follow that the BTA authorization holder will be able to achieve a substantial subscriber base in any particular market. To the contrary, the *MDS Auction Order* concedes that in many markets, and particularly the largest markets, there are few, if any, channels available for use by the BTA authorization holder.<sup>18/</sup> Clearly, if an incumbent wireless cable operator has already secured most of the available MDS and ITFS channels in a market, the prospects for the BTA authorization holder to provide a competitive service are dim. Yet, an ITFS licensee in such a market who desires to associate with the incumbent and reap the financial benefits of partnering with a successful operator, could be forced instead by an exercise of the right of first refusal to lease to a BTA authorization holder that has little prospect for gaining significant subscriber counts.

Along similar lines, many educators see leasing to a successful wireless cable system operator as a vehicle for bringing distance learning programming into the home environment. To these educators, too, the number of homes served by their wireless cable lessee is a significant consideration, for the more homes that are served, the more opportunities there are to provide distance learning programming. Yet, an exercise of the right of first refusal could

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<sup>18/</sup>See *MDS Auction Order* at ¶ 25.

deny an ITFS licensee of that benefit if it forces a licensee to lease excess capacity to a BTA authorization holder that is unlikely to gain significant subscriber penetration due to competition from an incumbent operator with significantly greater channel capacity.<sup>19/</sup>

Given these considerations, it is evident that educators have a strong incentive to lease their channels to the entity that is most likely to accumulate a full channel complement and provide a competitive video service. Thus, the stated objective of the right of first refusal -- promoting channel accumulation -- will be achieved by market forces. Where the BTA authorization holder secures a substantial number of MDS channels through the auction process, the ITFS channels will likely be leased to the BTA authorization holder even without a right of first refusal.<sup>20/</sup> On the other hand, where an incumbent wireless cable system operator holds a critical mass of channels and ITFS licensees are free to select their lessees, market forces will promote accumulation of the remaining channels by that operator. Thus, the right of first refusal is unnecessary to achieve the Commission's stated objective.

Finally, in a joint petition for reconsideration of the *MDS Auction Order* filed last

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<sup>19/</sup>Moreover, ITFS licensees generally rely upon their wireless cable lessees to provide essential technical and operational support. *Amendment of Part 74 of the Commission's Rules and Regulations In Regard to the Instructional Television Fixed Service*, 101 F.C.C.2d 50, 90 (1985). Indeed, freedom from the need to operate, maintain and repair facilities is often a primary motivation for ITFS licensees to enter into ITFS excess capacity leases. A BTA authorization holder that is a newcomer to the industry is unlikely to have comparable skills in these areas as an experienced wireless cable system operator. Thus, the right of first refusal could lead to a degradation in ITFS service quality.

<sup>20/</sup>The only conceivable exception will be those cases where there are serious concerns regarding the financial, technical or operational ability of the BTA authorization holder to develop a successful system.

week by Area Commission of Greenville Technical College and sixteen other ITFS licensees (collectively the "ITFS Parties"), several other cogent arguments were advanced against affording the BTA authorization holder a right of first refusal with respect to any lease of excess capacity on an ITFS station within its BTA.<sup>21/</sup> WCAI agrees with the arguments those educators have advanced in opposition to the right of first refusal, and in the interest of brevity will not repeat them here.

*B. The Commission Should Clarify The Rights That Will Be Afforded BTA Authorization Holders Following The Five-Year Build Out Period.*

The Commission can add certainty to the auction process and eliminate future disputes by clarifying the rights that a BTA authorization holder will enjoy, particularly after the five year build-out period. Uncertainty currently exists because the *MDS Auction Order* is silent as to whether BTA authorizations confer any rights after the five year build-out period and, if so, when (if ever) those rights expire.

Newly-adopted Section 21.930(a)(1) of the Rules provides that "a BTA authorization holder has a five-year build-out period . . . within which it may develop and expand MDS station operations within its service area."<sup>22/</sup> And, as newly-adopted Section 21.930(b)(1) makes clear, the BTA authorization holder

has the exclusive right to build, develop, expand and operate MDS stations within its BTA service area during the five-year build-out period. The

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<sup>21/</sup>See Petition for Reconsideration and Clarification of Area Commission of Greenville Technical College, *et al.*, MM Docket No. 94-131 and PP Docket No. 93-523 at 3-6 (filed Aug. 11, 1995)[hereinafter cited as "ITFS Parties Petition for Reconsideration"].

<sup>22/</sup>47 C.F.R. § 21.930(a)(1).



Commission will not accept competing applications for MDS station licenses within the BTA service area during this period.”<sup>23/</sup>

During that five year period, the BTA authorization holder must construct stations that are capable of providing service to at least two-thirds of the population of the applicable service area, excluding the populations within the protected service areas (“PSAs”) of incumbent stations.<sup>24/</sup> Within 60 days of the end of the five year build-out period, the BTA authorization holder must submit a showing that it is capable of providing adequate service to two-thirds of the population of the area within its control in the licensed BTA.<sup>25/</sup> If the BTA authorization holder achieves its build-out requirement, the Commission will issue an appropriate declaration.<sup>26/</sup> However, if the Commission determines that there are usable channels in an unserved area of the BTA, the Commission will force a partitioning of the unserved area along geographical boundaries and re-auction that newly-partitioned area.<sup>27/</sup>

Unfortunately, the *MDS Auction Order* and the newly-promulgated rules are silent as

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<sup>23/</sup>47 C.F.R. § 21.930(b)(1). It should be noted that although Paragraph 41 of the *MDS Auction Order* states that the BTA authorization holder will be the only entity eligible to apply for CITFS licenses within its BTA, the Commission has not amended Sections 74.990 and 74.991 of the Rules accordingly. WCAI understands that, although it is not clearly stated in the *MDS Auction Order*, it is the Commission’s intention to permit those currently eligible to apply for CITFS authorizations in a given market to continue to do so until a BTA authorization is granted for that market. Both of these matters should be addressed on reconsideration.

<sup>24/</sup>See 47 C.F.R. § 21.930(c)(1).

<sup>25/</sup>See *id.*; see also *MDS Auction Order* at ¶ 43.

<sup>26/</sup>See 47 C.F.R. § 21.930(d)(1).

<sup>27/</sup>See *MDS Auction Order* at ¶ 43.

to the rights the initial BTA authorization holder will have after the five-year build-out period expires and it either retains the BTA or retains a partitioned portion of the BTA. Nowhere in the *MDS Auction Order* or the new rules does the Commission address whether the BTA or partitioned service area authorization holder will have the right, much less the exclusive right, to add new stations within its service area after the build-out period.<sup>28/</sup> Thus, two questions are raised -- should the authorization holder retain any rights after the five-year build-out period other than those deriving from the individual station licenses issued during that period and, if so, what is an appropriate duration for those rights.

In WCAI's view, once the Commission has either determined that the BTA authorization holder serves two-thirds of the population of its BTA, or has partitioned away from the BTA authorization holder those portions of the BTA that were inadequately served, there is no reason to deny the holder of the BTA or partitioned service area authorization the right to add new facilities within its service area. Since the PSA of stations licensed to the authorization holder extends to the boundaries of the service area, it is the master authorization holder, and only the master authorization holder, that will be able to serve those

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<sup>28/</sup>As noted above, the *MDS Auction Order* is also unclear as to whether the right of first refusal awarded to BTA authorization holders with respect to lease of excess ITFS capacity can be exercised after the five-year build-out period. See *supra* note 12. Because the right of first refusal must be considered in a further notice of proposed rulemaking and not on reconsideration, see *supra* note 13, the issue of the duration of any right should be reserved for any future proceeding.

portions of the population not served within the first five years.<sup>29/</sup> Denying the master authorization holder the right to add new stations after five years merely condemns those not served as of five years to continued lack of service.

While the *MDS Auction Order* discusses in detail the term of the MDS authorization that will be issued to each BTA or partitioned service area authorization holder,<sup>30/</sup> it does not address the term of the master authorization itself. WCAI submits that, like the licenses for individual MDS station licensed to master authorization holders, the master authorization should itself be for a term of ten years, with a renewal expectancy similar to that awarded in other auctioned services, such as Personal Communications Service ("PCS") and the General Wireless Communications Service ("GWCS").<sup>31/</sup> As the Commission itself has recognized,

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<sup>29/</sup>If the Commission does not adopt WCAI's recommendation, at some point in the future the Commission may desire to consider a mechanism by which service can be provided to the residents of the BTA or remaining partitioned service area that are unserved after the five-year anniversary of the grant date of the initial BTA authorization. However, because the technical rules that will govern new entry will necessarily depend upon the technology being employed by master authorization holders, and the digital technologies that will likely predominate in five years are still under development, the Commission should defer consideration of how service should be provided to areas unserved by the master authorization holder until a later date.

<sup>30/</sup> See *MDS Auction Order* at ¶ 155-157. As noted *infra* at Section II.H, the Commission has not, but should, address the term of CITFS licenses issued to master authorization holders.

<sup>31/</sup> See *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 8 FCC Rcd 7700, 7753 (1993); *Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use*, ET Docket No. 94-32, FCC 95-319 at ¶¶ 114-115 (rel. Aug. 2, 1995)[hereinafter cited as "*GWCS Second Report and Order*"] It also appear that the Commission intends to afford Local Multipoint Distribution Service auction winners an exclusive ten year period for constructing facilities within their geographic service areas. See *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the*  
(continued...)

a "ten year period is of sufficient certainty and length to be fair to parties who must now pay considerable sums, and perhaps obtain outside financing, in order to acquire BTA authorizations . . ."<sup>32/</sup> Affording a relatively long master authorization term will provide a stable environment that is conducive to investment and will thereby foster the rapid development of new wireless cable services.<sup>33/</sup> Meanwhile, the five-year build-out requirement will prevent spectrum warehousing. A renewal expectancy similar to that awarded PCS and GWCS licensees, among others, will encourage investment in wireless cable facilities, avoid the replacement of an acceptable wireless cable service with an inferior one, and ensure continuity of wireless cable service.<sup>34/</sup>

*C. The Commission Should Clarify That The Coordinates For The Center Of Incumbent MDS PSAs Will Be Determined As Of September 15, 1995.*

The cornerstone of the Commission's efforts to assure that the switch to an auction-based geographic licensing system does not unfairly prejudice incumbent wireless cable system operators is the expansion of the PSA afforded incumbent MDS and ITFS stations to

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<sup>31/</sup>(...continued)  
*27.5 - 19.5 GHz Frequency Band, to Reallocate the 29.5 - 30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Service*, CC Docket No. 92-297, FCC 95-287 at ¶ 117 (rel. July 28, 1995).

<sup>32/</sup>*MDS Auction Order* at ¶ 157.

<sup>33/</sup>For the reasons set forth *supra* at note 29, the Commission should refrain at this time from adopting any rules or policies that would permit a newcomer to serve to areas unserved by the master authorization holder at the conclusion of its authorization term.

<sup>34/</sup>*See, e.g., Amendment of the Commission's Rules to Establish New Personal Communications Services*, 7 FCC Rcd 719, 719-22 (1991); *GWCS Second Report and Order* at ¶¶ 114-115.

a circle with a 35 mile radius. The Commission determined in the *MDS Auction Order*, and WCAI does not disagree, that “since the incumbent 35-mile protected circles will be embedded within one or more BTAs, to prevent additional encroachment into a BTA we must at some point fix the 35-mile circles around a permanent reference point, absent an interference agreement with a BTA authorization holder.”<sup>35/</sup> The problem, simply stated, is that there is an ambiguity as to the date on which the permanent reference point will be fixed.

Section 21.902(d)(2) of the Rules, as amended by the *MDS Auction Order*, states that “as of September 15, 1995, the location of the Protected Service Area boundaries shall become fixed.”<sup>36/</sup> However, In Paragraph 58 of the text of the *MDS Auction Order*, the Commission announced that “on the effective date of the rules adopted in the *Second Order on Reconsideration* [in General Docket Nos. 90-54 and 80-113], we will permanently fix the location of the protected 35-mile circles.”<sup>37/</sup> The new PSA definition becomes effective on September 18, 1995.<sup>38/</sup> Therefore, Paragraph 58 suggests that the center reference point for determining the PSA will become fixed on September 18, 1995, and not on September 15th.

During informal discussions with members of the Commission’s staff, WCAI was advised that the intention is for the PSA reference point to become fixed on September 15, 1995, even though the PSA expansion from a 15-mile radius to a 35-mile radius will not

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<sup>35/</sup>*MDS Auction Order* at ¶ 58.

<sup>36/</sup>47 C.F.R. § 92.902(d)(2).

<sup>37/</sup>*Id.*

<sup>38/</sup>*See* 60 Fed. Reg. 36,737 (July 18, 1995).

become effective until September 18, 1995. WCAI concurs with that approach, but requests that on reconsideration the Commission clarify the date on which the PSA reference point becomes fixed so as to avoid disputes in the future.

*D. The Commission Should Conform the PSAs Afforded The Various Stations Providing Channel Capacity To A Wireless Cable System Operator.*

**1. The Commission Should Afford An ITFS Licensee Collocating With An MDS Station That Is Relocated After September 15, 1995 The Flexibility To Select The Same Coordinates As The MDS Station For The Center Reference Point Of Its ITFS PSA.**

The *MDS Auction Order* is silent as to whether the Commission intends to fix the reference point of the PSA afforded ITFS stations that lease excess capacity, and WCAI understands from informal discussions with the Commission's staff that the Commission does not intend to do so. While WCAI recognizes that the event driving the fixing of the reference point for incumbent MDS stations -- the switch to geographic licensing for MDS -- is not present in the ITFS (where facility-specific licensing continues), the Commission should recognize that its decision can lead to incongruous results.

Historically, the Commission has recognized the importance of affording all of the stations comprising a wireless cable system a common PSA.<sup>39/</sup> As the Commission correctly

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<sup>39/</sup>See *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 6 FCC Rcd 6764, 6766-67 (1991)(amending rules to afford PSA to ITFS licensees that lease excess capacity)[hereinafter cited as "*Gen. Docket No. 90-54 Order on Reconsideration*"], 6 FCC Rcd 6792, 6805-806 (1991)(amending rules to afford PSA to commercial licensees of ITFS channels)[hereinafter cited as "*Gen. Docket No. 90-54 Second Report and Order*"].

recognized when it first afforded ITFS licensees a PSA during the hours that excess capacity is leased to a wireless cable operator, absent a common PSA for all channels, "wireless cable operators may be deprived of access to additional channels, free from harmful interference, that may be necessary in order to compete with a cable television company offering 50 or more channels in a particular locality."<sup>40/</sup> Under the rules in existence prior to the *MDS Auction Order*, when a wireless cable system changed its transmission site, the PSAs for all of the stations comprising the system remained identical. Now, however, if MDS stations are relocated after the reference point is fixed, their PSA will remain static, while ITFS stations that are collocated with those relocated MDS stations will have PSAs centered on the new station location -- PSAs that will no longer be co-terminus with the MDS PSAs.

This result is undesirable to both the operator of the affected system and operators of neighboring systems. To the affected operator, it means that there will be areas it serves where PSA protection will not be available on all channels. Since wireless cable systems compete in a multichannel marketplace where consumers are purchasing a package of programs, interference to even a few channels makes the service unattractive to consumers. It should go without saying that if a consumer must suffer interference on either the MDS channels or the ITFS channels employed by a wireless cable system, that consumer will not be satisfied with the service offering. Yet, that is exactly what could happen under the approach taken in the *MDS Auction Order*, for there could be some areas where only the ITFS channels are protected and other areas where only the MDS channels are protected.

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<sup>40/</sup>*Gen. Docket No. 90-54 Order on Reconsideration*, 6 FCC Rcd at 6767.

Thus, the affected operator would prefer to have a common PSA for all its channels.

Operators and developers of neighboring systems, too, would prefer to see the affected operator have a common PSA for all channels. Like all wireless cable system operators, these neighbors must design their systems using common transmission parameters for all channels. To the extent technical compromises must be made to meet interference protection obligations on one channel, those compromises will have to be made on all channels. If one set of compromises is necessary to protect the PSA of the MDS channels, and another set of compromises is necessary to protect the PSA of the ITFS channels, the lowest common denominator prevails -- both sets of compromises will be required. The net result in such a situation is that the neighboring system will be unable to serve areas that could otherwise be served. That is hardly consistent with the objectives of maximizing interference-free service to the public and spectral efficiency.

WCAI understands that the decision not to fix the ITFS PSA reference point was apparently motivated by the Commission's desire to afford ITFS licensees a measure of flexibility. WCAI believes that the same goal can be achieved by affording ITFS licensees that collocate with MDS stations the option of having either a PSA center at the actual station location or a PSA co-terminus with any collocated MDS station. WCAI presumes that in most cases, the ITFS licensee would choose the latter for, as the Commission has recognized, a common MDS/ITFS PSA increases the value of ITFS excess capacity, leading to increased revenues.<sup>41/</sup> By giving the licensee an option, however, the Commission can maximize ITFS

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<sup>41/</sup>See *id.* at 6766-67.



licensee flexibility.

**2. The Commission Should Reconsider Its Decision To Reduce The PSA Afforded An ITFS Station Leased To A BTA Authorization Holder To The BTA Boundary If The Same Channels Are Leased By The Adjacent BTA Authorization Holder.**

Paragraph 41 of the *MDS Auction Order* states that “where a BTA authorization holder leases excess channel capacity from an ITFS licensee, the protected area will be a 35-mile circle centered around the particular ITFS station in the BTA that leases the channels.”<sup>42/</sup> WCAI generally concurs with that decision (subject to adoption of WCAI’s proposal to permit ITFS stations collocating with incumbent MDS stations to have identical PSA center reference coordinates). What troubles WCAI is the Commission’s statement that whenever BTA authorization holders in adjacent BTAs both lease the same ITFS channel group, and the 35-mile PSAs of each extends into the BTA of the other, the ITFS station will not be entitled to interference protection outside the PSA in which it is located.<sup>43/</sup>

The Commission has determined that when a BTA authorization holder acquires or leases an incumbent MDS station that has a circular PSA with a 35 mile radius, the PSA of that station “will extend to the BTA boundary or the existing 35-mile protected circular area (from the incumbent), whichever is larger.”<sup>44/</sup> WCAI agrees with this approach, for it assures that if the operator of an existing system secures a BTA authorization or if an operating

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<sup>42/</sup>*MDS Auction Order* at ¶41.

<sup>43/</sup>*See id.*

<sup>44/</sup>*MDS Auction Order* at ¶ 45.